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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

JIMMY LI,

Plaintiff and Respondent,

v.

SIMPSON THACHER & BARTLETT, et  
al.

Defendants and Appellants.

H034948

(Santa Clara County  
Super. Ct. No. CV141528)

**I. INTRODUCTION**

Appellants Simpson Thacher & Bartlett, a law firm, and George M. Newcombe, a Simpson Thacher & Bartlett partner (collectively, Simpson Thacher) represented PrediWave Corporation (PrediWave) in a lawsuit filed in Los Angeles County Superior Court (the Los Angeles action) against respondent Jimmy Li (Li). In the Los Angeles action, PrediWave alleged that Li was liable for breach of fiduciary duty and other wrongdoing in his capacity as an outside director of PrediWave. After the Los Angeles action was voluntarily dismissed, Li brought the instant malicious prosecution action against Simpson Thacher in Santa Clara County Superior Court.

Simpson Thacher responded to Li's malicious prosecution action by filing a special motion to strike the complaint under the anti-SLAPP statute, Code of Civil

Procedure section 425.16,<sup>1</sup> which provides that a cause of action arising from constitutionally protecting speech or petitioning activity is subject to a special motion to strike unless the plaintiff establishes a probability of prevailing on the claim. (§425.16, subd. (b)(1).) The trial court denied the motion, finding that Li had shown that he had a probability of prevailing on his malicious prosecution claim because Simpson Thacher lacked probable cause for initiating and maintaining the Los Angeles action. Specifically, the trial court found that Li's evidence was sufficient to show that Li had acted in furtherance of his fiduciary duty and his conduct was protected by the business judgment rule (Corp. Code, § 309) and the litigation privilege (Civ. Code, § 47, subd. (b).)

On appeal, Simpson Thacher argues that there was probable cause to initiate and continue prosecuting the Los Angeles action because PrediWave's claims against Li were legally tenable. For the reasons stated below, we determine that Li met his burden to show a probability that he will prevail on his malicious prosecution claim because Simpson Thacher continued to prosecute the Los Angeles action after discovering that a cause of action for breach of fiduciary duty against Li lacked probable cause. Therefore, we will affirm the order denying Simpson Thacher's special motion to strike the complaint.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Background Facts***

During the time period relevant to this matter, PrediWave was a California company based in Fremont that developed technology products to enable the delivery of

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<sup>1</sup> "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732 (*Jarrow*).)

All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

“Video on Demand” through cable, satellite, and broadcast transmissions in China.<sup>2</sup> New World TMT Limited (New World) is a multinational conglomerate incorporated in the Cayman Islands and headquartered in Hong Kong. New World invested millions of dollars in PrediWave, including entering into a stock purchase agreement for all of PrediWave’s preferred shares. As a result of the stock purchase agreement, New World became a minority shareholder entitled to appoint two representatives to PrediWave’s board of directors. On April 28, 2004, New World appointed Li to the PrediWave board. The other New World appointment to the PrediWave board was Fu Sze Shing (Fu).

By May 2004, PrediWave and New World had become litigation adversaries due to a number of contractual disputes. Their litigation included PrediWave’s action against New World in federal court, entitled (*PrediWave Corp. v. New World Infrastructure Ltd.* (N. D.Cal. No. C 024-01900)). New World sued PrediWave in Santa Clara County Superior Court in an action entitled *New World TMT, Limited v. PrediWave Corp.* (Super. Ct. Santa Clara County, 2004, No. CV020369).<sup>3</sup>

### **B. *The Los Angeles Action***

On May 19, 2004, less than one month after Li’s appointment to the PrediWave board of directors, PrediWave filed an action against Li and Fu in Los Angeles County

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<sup>2</sup> We take judicial notice of this court’s opinion in a related case, *Li v. PrediWave Corporation* (Sept. 23, 2005, H027769) [nonpub. opn.]. (Evid. Code, § 452, subd. (d).) Our summary of the background facts of this case includes some background information that we have taken from our prior opinion, in which we affirmed the trial court’s order denying PrediWave’s motion to disqualify Li’s counsel in the writ action filed by Li to compel inspection of PrediWave’s books and records.

<sup>3</sup> We take judicial notice of another related decision, *Prediwave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1213, in which this court reversed the order granting Simpson Thacher’s special motion to strike the complaint in PrediWave’s legal malpractice action against Simpson Thacher in Santa Clara County Superior Court, case No. CV110304.

*(PrediWave Corporation v. Li* (Super. Ct. L.A. County, 2004, No. BC315799).)

According to the allegations of the first amended complaint, the Los Angeles action arose from steps taken by Li and Fu shortly after their appointments to the Prediwave board.

On April 28, 2004, Li and Fu sent letters to four financial institutions where PrediWave maintained accounts, including Wells Fargo Bank, Merrill Lynch, Bank of America, and Washington Mutual (the Bank Letters). PrediWave alleged that in the Bank Letters Li and Fu falsely identified themselves as two of the three members of the PrediWave board and demanded that the financial institutions “not process any withdrawal in excess of \$500,000 from accounts maintained by PrediWave, unless those withdrawals bore one of their signatures.” Li and Fu also warned that any withdrawal that exceeded \$500,000 and did not bear one of their signatures “ ‘is unauthorized and is most likely a fraudulent conveyance.’ ” Additionally, Li and Fu demanded that no checks exceeding \$50,000 be processed without providing notice and an opportunity to object to their attorneys. Three of the financial institutions froze PrediWave’s accounts or imposed restrictions after receiving the Bank Letters.

Next, on April 29, 2004, Li demanded to inspect the books and records of PrediWave pursuant to Corporations Code section 1602. PrediWave did not allow the inspection because Li had refused to agree that “he would use confidential information only in the discharge of his fiduciary duties” and also had refused to agree “to refrain from using confidential PrediWave information to further New World’s interests in litigation against PrediWave . . . .”

In the first amended complaint, PrediWave stated causes of action against Li and Fu for breach of fiduciary duty arising from the Bank Letters (Corp. Code, § 309), tortious interference with PrediWave’s contractual relations, tortious interference with prospective economic advantage, unfair competition (Bus. & Prof. Code, § 17200 et seq.), and declaratory relief. PrediWave also stated a separate cause of action for breach of fiduciary duty against Li, based on his demand to inspect PrediWave’s books and

records and his alleged intention of sharing “the information with New World to assist New World in a commercial dispute with PrediWave.”

PrediWave voluntarily dismissed the Los Angeles action against Li without prejudice on May 4, 2007.

***C. The Malicious Prosecution Action***

Li filed the instant malicious prosecution action against Simpson Thacher in Santa Clara County (*Li v. Simpson Thacher & Bartlett, LLP* (Super. Ct. Santa Clara County, 2009, No. 109CV141528)). The allegations of the first amended complaint (the complaint) give a different view of Li’s conduct as an outside director of PrediWave.

According to the complaint, Li reviewed all of the PrediWave corporate documents that were available to him after his appointment to the PrediWave board. These documents included board resolutions approving the payment of bonuses totaling more than \$95 million to Jianping “Tony” Qu (Qu), the president, CEO and majority shareholder of PrediWave, and also approving payments totaling an additional \$8 million to purchase real estate and luxury vehicles for Qu’s use and to improve Qu’s property. Additionally, PrediWave’s corporate documents indicated that “spare parts, including memory chips [were] sold to New World at exorbitant prices.”

Based on his review of PrediWave’s corporate documents, Li suspected that Qu was perpetuating a fraud on PrediWave and New World. For that reason, Li conducting a fraud investigation that included the letter that Li and Fu sent to Qu on April 28, 2004, informing him that they were exercising their statutory right to inspect PrediWave’s books and records. Additionally, on April 29, 2004, Li and Fu sent the Bank Letters to “PrediWave’s financial institutions--Bank of America, Wells Fargo, Merrill Lynch, and Washington Mutual--informing them that as two members of PrediWave’s Board, they were ‘in the process of commencing an audit’ of the financial records of PrediWave and its related entities[.] The Bank Letters noted that any withdrawals over \$500,000 needed to be cosigned by a New World representative, pursuant to the PrediWave Stock

Purchase Agreement. The Bank Letters also requested that the banks provide Li and Fu with a summary of PrediWave's accounts, as they had done in the past, and provide notice of any withdrawals from PrediWave's account(s) in excess of \$50,000."

The complaint further alleges that PrediWave retained Simpson Thacher in April or early May 2004, both as "corporate counsel, to provide strategic advice and assistance in all matters generally, and specifically in matters arising out of its directors' allegations and its disputes with New World," and as "litigation counsel for PrediWave, Qu, and their related companies." Regarding the Los Angeles action, the complaint alleges that "Simpson [Thacher] advised PrediWave to file a lawsuit against Li and Fu, in order to: (1) hamper the investigation initiated by Li and Fu; (2) block Li's inspection of books and records; (3) insure Qu had unfettered access to funds in the PrediWave bank accounts; and (4) create a diversion from the billion-dollar commercial dispute with New World."

According to the complaint, discovery in the Santa Clara action (*New World TMT Limited v. PrediWave Corp., supra*) revealed that Li's suspicions regarding Qu were well-founded. Simpson Thacher's own investigation and internal law firm documents showed that Qu's mother and brother controlled Modern Office Technology, which sold memory chips to PrediWave in "sham transactions costing PrediWave and New World millions of dollars." During the investigation, Qu falsely stated to Simpson Thacher's attorneys during a December 1, 2004 interview that his mother had no involvement with Modern Office Technology, although he was presented with documents showing that she was company president. Qu also claimed that Modern Office Technology had not made a profit on PrediWave's memory chip purchases, but Simpson Thacher's own investigation, as documented in an April 4, 2005 internal memorandum, showed that Modern Office Technology actually had made a profit.

On December 9, 2004, Li's attorney sent a letter to Simpson Thacher offering to waive Li's right to bring a malicious prosecution action based on the Los Angeles action

in exchange for a dismissal of all claims. Simpson Thacher refused, and in April 2005 Li filed a motion for summary judgment in the Los Angeles action that Simpson Thacher opposed. In May 2005, Simpson Thacher defended Qu's deposition in the Los Angeles action. During that deposition, Qu testified that "he did not know who ran Modern Office Technology," which contradicted his statements during his December 2004 interview with Simpson Thacher's attorneys.

The complaint further alleges that Simpson Thacher continued to represent PrediWave in the Los Angeles action even though they knew that Qu's deposition testimony was false and Li's investigation of PrediWave was "objectively reasonable." Simpson Thacher ceased representing Qu and PrediWave in June 2005. In April 2006, PrediWave declared bankruptcy.

After Qu failed to appear for his deposition and a mandatory settlement conference in the Santa Clara action, the trial court granted New World's motion for terminating sanctions. Judgment in New World's favor was entered on December 27, 2006. A second amended judgment in the amount of \$2,817,075,320.20, including \$2 million in punitive damages, was later entered in the Santa Clara action.

Li alleges that he lost his position as senior vice-president of a leading film entertainment company due to the allegations in the Los Angeles action that he was "an incompetent and treacherous Director of PrediWave . . . ." Additionally, "as a result of the turmoil created by [Simpson Thacher's] vexatious litigation strategy and false accusations against Li outside of court, Li was left with no choice but to return to his native Hong Kong and attempt to rebuild his career."

Based on these and other allegations, the complaint asserts a single cause of action for malicious prosecution and seeks compensatory and punitive damages.

#### ***D. Simpson Thacher's Special Motion to Strike the Complaint***

On July 30, 2009, Simpson Thacher filed a special motion to strike the first amended complaint in Li's malicious prosecution action under section 425.16. The

motion was supported by a memorandum of points and authorities and a declaration of counsel with accompanying exhibits.

In its memorandum of points and authorities, Simpson Thacher argued that a malicious prosecution action is subject to a special motion to strike under the anti-SLAPPS statute, section 425.16, as held by the California Supreme Court in *Jarrow*, *supra*, 31 Cal.4th 728. Simpson Thacher further argued that Li could not meet his burden to show that section 425.16 did not apply because he had a probability of prevailing in his malicious prosecution action.

According to Simpson Thacher, Li could not satisfy the second element of a malicious prosecution cause of action--that the underlying action was brought without probable cause--because the claims made in the Los Angeles action were objectively tenable since they were based on Li's conduct in sending the false Bank Letters and disclosing PrediWave's confidential information to New World's litigation counsel, thereby breaching his fiduciary duties as a PrediWave director.

Simpson Thacher explained that the Bank Letters were false for two reasons. First, the Bank Letters' statement that Li and Fu were two of the three directors of the PrediWave board was false because the PrediWave board actually had six members, as reflected in New World's stock purchase agreement and other PrediWave corporate documents. Second, the Bank Letters' statement that Li and Fu had signature authority was false because a Prediwave board resolution had previously lifted the requirement that the signature of a New World representative was required on third-party transfers in excess of \$500,000, with the result that only Qu's signature was required.

Finally, Simpson Thacher argued that no privilege defense asserted by Li could overcome PrediWave's legally tenable claims in the Los Angeles action, since the claims were based on Li's malicious bad faith conduct and were therefore outside the scope of any potentially applicable privilege.

***E. Li's Opposition to the Special Motion to Strike the Complaint***

Li filed a memorandum of points and authorities in opposition to the special motion to strike under section 425.16, which was accompanied by the declaration of an attorney expert in professional responsibility and an attorney expert in corporate law, plus the exhibits attached to the declarations.<sup>4</sup> Li argued that the special motion to strike should be denied for two reasons.

First, Li contended that section 425.16 does not apply to speech or petitioning activity in furtherance of an illegal conspiracy. He asserted that his malicious prosecution action was based on the Los Angeles action, which “was part of a conspiracy among Simpson Thacher, PrediWave, and Qu to silence Li and prevent him from fulfilling his fiduciary responsibilities as a PrediWave board member to investigate misappropriation and fraud by Qu and to protect New World’s interests as a preferred shareholder of Prediwave.”

Second, Li argued that he has a probability of prevailing in the malicious prosecution action because he had a fiduciary duty, as a PrediWave director, to send the Bank Letters and to demand inspection of PrediWave’s books and records in order to ensure that Qu was not misappropriating PrediWave’s assets and to protect New World’s interests as a minority shareholder. Li also argued that his decision to send the Bank Letters was protected as the exercise of his business judgment by the business judgment rule (Corp. Code, § 309), as prelitigation communications under the litigation privilege (Civ. Code, § 47, subd. (b)), as conduct reasonably related to the right to petition under

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<sup>4</sup> As Simpson Thacher points out, an expert may not give an opinion on the probable cause element of a malicious prosecution cause of action, since that is a question of law for the court to decide. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884 (*Sheldon Appel*)). For that reason, we have disregarded the expert declarations of attorneys Ellen Peck and Irving Kagan, which Li filed in support of his opposition to the anti-SLAPPS motion, regarding whether Simpson Thacher had probable cause to initiate and continue prosecuting the Los Angeles action.

the *Noerr-Pennington* doctrine,<sup>5</sup> and as communications made to interested persons under the common-interest privilege (Civ. Code, § 47, subd. (c)).

Alternatively, Li argued that even assuming there was probable cause to initiate the Los Angeles action in 2004, Simpson Thacher lacked probable cause to continue prosecuting the action by the time it opposed Li's summary judgment motion in April 2005. According to Li, Simpson Thacher's own investigation had revealed that Qu lied about his family's role in Modern Office Technology and the memory chip transactions, and therefore Simpson Thacher "knew, or had reason to suspect, that Qu was subverting New World's interests as a preferred minority shareholder of PrediWave and was misappropriating New World's funds in PrediWave's treasury as his own. [Simpson Thacher was] on notice that Li's suspicions of wrongdoing by Qu had merit and that Li's efforts to investigate Qu's activities were a good-faith exercise of his duties as a PrediWave director." Additionally, Li asserted that Simpson Thacher knew by April 2005 that Li had denied sharing confidential PrediWave information with New World.

#### ***F. The Trial Court's Order***

The trial court denied Simpson Thacher's special motion to strike the first amended complaint. As stated in its order of November 5, 2009, the court made four findings: (1) Simpson Thacher's filing and maintenance of the Los Angeles action was an activity protected under the anti-SLAPP statute (§ 425.16, subd. (e)); (2) Li had shown "a probability of prevailing on the merits by submitting evidence that [Simpson Thacher] lacked probable cause for initiating and maintaining the Los Angeles action. Li had fiduciary duties of his own (see *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107-

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<sup>5</sup> "The *Noerr-Pennington* doctrine is a broad rule of statutory construction, under which laws are construed so as to avoid burdening the constitutional right to petition. [Citations.]" (*Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1065-1065.)

109), and he acted in furtherance of those duties when he sent the bank letters.”; (3) “Li’s evidence is also sufficient to sustain a finding that his conduct, as alleged in the First Amended Complaint in the Los Angeles action, was protected by the business judgment rule (Corp. Code, § 309) and the litigation privilege (Civ. Code, § 47, subd. (b).);” and (4) Simpson Thacher’s evidence “does not defeat this showing as a matter of law. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 [(*Soukup*)].)” The trial court also denied Li’s motion to lift the discovery stay.

Simpson Thacher filed a timely notice of appeal.<sup>6</sup>

### III. DISCUSSION

On appeal, Simpson Thacher contends that the trial court erred in denying its anti-SLAPP motion to strike the first amended complaint because Li failed to meet his burden, as the plaintiff opposing the motion, to establish a probability of prevailing on his malicious prosecution claim. We will begin our evaluation of Simpson Thacher’s contention with an overview of section 425.16, the anti-SLAPP statute, followed by a discussion of the applicable standard of review.

#### A. Section 425.16

Section 425.16 was enacted in 1992 in response to a “disturbing increase” in lawsuits brought for the strategic purpose of chilling a defendant’s rights of petition and free speech. (§ 425.16, subd. (a).)<sup>7</sup> SLAPPs (strategic lawsuits against public

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<sup>6</sup> An order denying a special motion to strike the complaint under section 425.16 is an appealable order. (*Chambers v. Miller* (2006) 140 Cal.App.4th 821, 824.)

<sup>7</sup> Section 425.16, subdivision (a) provides, “(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.”

participation) are unsubstantiated lawsuits based on claims arising from defendant's constitutionally protected speech or petitioning activity. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*.)

Section 425.16 applies to any cause of action against a person "arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue . . . ." (§ 425.16, subs. (b)(1), (e)(4).) The stated purpose of section 425.16 is to encourage protected speech by permitting a court to promptly dismiss unmeritorious actions or claims that are brought "primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a); *Soukup, supra*, 39 Cal.4th at p. 278.)

Under section 425.16, the trial court evaluates the merits of a possible SLAPP by "using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) The procedures authorized in the statute allow a defendant to stay discovery before litigation costs mount, obtain early dismissal of the lawsuit, and recover attorney's fees. (*Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 197-198.)

A defendant seeking the protection of the anti-SLAPP statute has the burden of making the initial showing that the lawsuit arises from conduct "in furtherance of [a] person's right of petition or free speech under the United States or California Constitution in connection with a public issue<sup>[8]</sup> . . . ." (§ 425.16, subs. (b)(1), (e)(4); *Navellier*,

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<sup>8</sup> A public issue within the meaning of section 425.16 includes speech activity that takes place before, during, or in connection with an "official proceeding authorized by law." (§ 425.16, subd. (e)(1), (e)(2); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116-1117.)

*supra*, 29 Cal.4th at p. 88.) Once the defendant has shown that the plaintiff’s claim arises from one of the section 425.16, subdivision (e) categories of protected activity, the burden shifts to the plaintiff to demonstrate a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); *Navellier*, *supra*, 29 Cal.4th at p. 88.)

Thus, “ ‘[s]ection 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity . . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim.’ [Citation.] ‘Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.’ [Citation.]” (*Soukup*, *supra*, 39 Cal.4th at pp. 278-279.)

### **B. *The Standard of Review***

“Review of an order granting or denying a motion to strike under section 425.16 is *de novo*. [Citation.] We consider ‘the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.’ (§ 425.16, subd. (b)(2).) However, we neither ‘weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation.]” (*Soukup*, *supra*, 39 Cal.4th at p. 269, fn.3.)

Applying this standard of review, we will independently determine from our review of the record whether Li’s malicious prosecution is a SLAPP under the two-prong test set forth in *Soukup*, *supra*, 39 Cal.4th at pages 278-279.

### **C. *The First Prong of the Anti-SLAPP Statute***

We find that Simpson Thacher’s anti-SLAPP motion satisfied the first prong of the anti-SLAPP statute by making a threshold showing that Li’s malicious prosecution action

arises from activity protected under section 425.16: Simpson Thacher’s filing and prosecution of the Los Angeles action. “The filing of lawsuits is an aspect of the First Amendment right of petition.” (*Soukup, supra*, 39 Cal.4th at p. 291.) And, “ ‘[b]y definition, a malicious prosecution suit alleges that the defendant committed a tort by filing a lawsuit.’ [Citation.]” (*Ibid.*) The California Supreme Court has accordingly held that a malicious prosecution action that arises from a civil lawsuit is not exempt from the anti-SLAPP statute. (*Jarrow, supra*, 31 Cal.4th at p. 741.)

**D. *The Second Prong of the Anti-SLAPP Statute***

Since Simpson Thacher’s motion satisfied the first prong of the anti-SLAPP statute, the burden shifted to Li to demonstrate the probability of prevailing on his malicious prosecution claim and thereby establish that the second prong of the anti-SLAPP statute has not been satisfied. (*Soukup, supra*, 39 Cal.4th at pp. 278-279.)

The California Supreme Court has described the plaintiff’s burden as follows: “To establish a probability of prevailing, the plaintiff ‘must demonstrate that the complaint is both legally sufficient<sup>9</sup> and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ [Citations.]” (*Soukup, supra*, 39 Cal.4th at p. 291.) Importantly, we do not “weigh conflicting evidence to determine whether it is more probable than not that plaintiff will prevail on the claim . . . .” (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) We emphasize that our standard of review requires us to consider the defendant’s evidence “only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ [Citation]” (*Soukup, supra*, 39 Cal.4th at p. 269, fn. 3.)

Thus, Simpson Thacher’s anti-SLAPP motion must be granted unless Li made a prima facie showing of facts sufficient to support each element of his malicious

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<sup>9</sup> Simpson Thacher has not challenged the sufficiency of the first amended complaint in the instant malicious prosecution action.

prosecution claim. (*Soukup, supra*, 39 Cal.4th at p. 291.) “To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice.” (*Soukup, supra*, 39 Cal.4th at p. 292.) We will discuss each element in turn.

### **1. Favorable Termination**

To support the first element of favorable termination, Li showed that Simpson Thacher voluntarily dismissed the Los Angeles action without prejudice on May 4, 2007. The general rule is that a voluntary, unilateral dismissal of a complaint, even where made without prejudice, constitutes a favorable termination for purposes of a malicious prosecution action. (*Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808; *Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1401.) Therefore, we find that Li’s showing is sufficient to support the first element of his malicious prosecution claim. Simpson Thacher has not argued to the contrary, either in the proceedings below or on appeal.

### **2. Lack of Probable Cause**

#### ***The Parties’ Contentions***

Simpson Thacher argues that Li cannot show the absence of probable cause to initiate the Los Angeles action because Li’s act of sending the false Bank Letters supported all of the causes of action in the original complaint, including breach of Li’s fiduciary duty as a member of the PrediWave board, tortious interference with PrediWave’s business relationships, unfair business activity under Business and Profession Code section 17200, interference with PrediWave’s contractual relationships with its financial institutions, and declaratory relief regarding the falsity of the Bank Letters’ claim that PrediWave had only three directors. Simpson Thacher also argues that the Bank Letters caused harm to PrediWave when its bank accounts were frozen.

Referring to the allegations of the first amended complaint, Simpson Thacher further argues that the cause of action for breach of fiduciary duty based on Li's demand to inspect PrediWave's books and records was supported by Li's conduct in " 'sharing, attempting to share or threatening to share confidential information about PrediWave' with New World, PrediWave's litigation adversary, by providing that information to New World's litigation counsel."

Additionally, Simpson Thacher rejects the trial court's ruling that Li's conduct was protected by the affirmative defenses of the business judgment rule and the litigation privilege (Civ. Code, § 47, subd. (b).) The business judgment rule is inapplicable, according to Simpson Thacher, because Li acted in bad faith, failed to make a reasonable inquiry before sending the false Bank Letters, and had a conflict of interest since he was New World's agent. Simpson Thacher also views the Bank Letters as lacking any relationship to the writ action that Li subsequently filed to obtain access to PrediWave's books and records, and for that reason contends that the litigation privilege does not bar claims arising from the Bank Letters. Simpson Thacher further contends that Li's alleged conduct in turning over PrediWave's confidential information to New World's attorneys was communicative conduct outside the scope of the litigation privilege. The common interest privilege (Civ. Code, § 47, subd. (c)) and the *Noerr-Pennington* doctrine are similarly inapplicable to the Los Angeles action, according to Simpson Thacher.

As to Li's claim that by April 2005 there was not probable cause to support continued prosecution of the Los Angeles action, Simpson Thacher maintains that PrediWave's claims remained objectively tenable on the basis of the false Bank Letters and Li's disclosure of PrediWave's confidential information to New World. In Simpson Thacher's view, even assuming that they knew of Qu's misconduct as CEO of PrediWave, that knowledge is irrelevant to a determination of whether Li breached his own fiduciary duties. Alternatively, Simpson Thacher argues that its internal documents

regarding its investigation of Qu and Modern Office Technology were insufficient to show that Qu had lied or committed fraud.

Li responds that when the evidence is viewed in the light most favorable to him and Simpson Thacher's contradictory evidence is disregarded, as required by the applicable standard of review, it is apparent that the trial court properly denied Simpson Thacher's anti-SLAPPS motion. According to Li, the evidence shows that he sent the Bank Letters and sought inspection of PrediWave's books and records in fulfillment of his fiduciary duty as a PrediWave director to "stop Qu from looting PrediWave's funds for his personal use and to stop improper self-dealing transactions involving [Modern Office Technology]." Li therefore argues that there was no probable cause for the breach of fiduciary duty causes of action, nor any of the other causes of action in the Los Angeles action, since the Bank Letters were sent in good faith for the purpose of investigating Qu's conduct. Additionally, Li reiterates his arguments below that the Los Angeles action was barred at its inception by the business judgment rule, the litigation privilege (Civ. Code, § 47, subd. (b)), the *Noerr-Pennington* doctrine, and the common interest privilege (Civ. Code, § 47, subd. (c)).

Alternatively, Li contends that Simpson Thacher did not have probable cause to continue prosecuting the Los Angeles action when they opposed his summary judgment motion in April 2005, because by that time Simpson Thacher knew that Li's suspicions about Qu's wrongdoing had merit due to their own investigation of Qu and the Modern Office Technology memory chip transactions. Li explains that his evidence established that he "(1) sent the Bank Letters in good faith; (2) properly and correctly (and with a good faith belief) stated that he was one of three directors of PrediWave and that New World had cosignature authority over PrediWave checks over \$500,000, (3) did so to investigate suspicious activity by Qu with respect to PrediWave's finances, (4) thoroughly researched pertinent PrediWave board resolutions and other documents that were available to him, (5) did not labor under a conflict of interest with respect to

PrediWave and New World, and (6) inspected PrediWave's books and records in furtherance of his investigation into Qu's malfeasance at PrediWave."

In the event this court disagrees that the evidence is sufficient to show that Los Angeles action lacked probable cause, Li requests that the matter be remanded with instructions to consider Li's motion for limited discovery under section 425.16, subdivision (g).

### *Analysis*

Because we find the issue to be dispositive, we will first consider Li's contention that Simpson Thacher lacked probable cause to continue prosecuting the Los Angeles action.

The existence or absence of probable cause is a question of law to be determined by the court. (*Sheldon Appel, supra*, 47 Cal.3d at p. 875.) The California Supreme Court has instructed that "[t]he question of probable cause is 'whether as an objective matter, the prior action was legally tenable or not.' [Citation.] 'A litigant will lack probable cause for his [or her] action either if he [or she] relies upon facts which he [or she] has no reasonable cause to believe to be true, or if he or [she] seeks recovery upon a legal theory which is untenable under the facts known to him [or her].' [Citation.] 'In a situation of a complete absence of supporting evidence, it cannot be adjudged reasonable to prosecute a claim.' [Citation.]" (*Soukup, supra*, 39 Cal.4th at p. 292.)

In other words, "[t]he probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel, supra*, 47 Cal.3d at p. 878.) " 'The test applied to determine whether a claim is tenable is 'whether any reasonable attorney would have thought the claim tenable.' [Citation.]' " (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 971 (*Zamos*).

A claim for malicious prosecution is not limited to a cause of action that lacked probable cause when the complaint was filed. In *Zamos*, the California Supreme Court determined that the standard for probable cause “will apply to the continuation as to the initiation of a suit.” (*Zamos, supra*, 32 Cal.4th at p. 970.) Thus, “an attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause.” (*Ibid.*)

Moreover, a prima facie showing that probable cause was lacking as to one cause of action in the underlying action is sufficient to demonstrate the probability of prevailing in a malicious prosecution action and thereby defeat an anti-SLAPP motion. “Probable cause . . . must exist for every cause of action advanced in the underlying action. ‘[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted . . . .’ [Citations.]” (*Soukup, supra*, 39 Cal.4th at p. 292.) Thus, to demonstrate a probability of prevailing on his malicious prosecution claim, it was sufficient for Li to make a prima facie showing that Simpson Thacher continued to prosecute one cause of action in the Los Angeles action that lacked probable cause.

Having independently reviewed the record in this matter (§ 425.16, subd. (b)(2)), we find that Li made a prima facie showing that Simpson Thacher continued to prosecute the Los Angeles action after discovering, no later than April 2005, facts that showed an absence of probable cause for the first cause of action for breach of fiduciary duty, which alleged that Li sent false Bank Letters to PrediWave’s financial institutions.

The first cause of action in the complaint states in its entirety, “In sending the [Bank Letters] that included patently false and highly damaging statements regarding PrediWave to the Banks, and by demanding unauthorized and harmful actions from the Banks towards PrediWave, Defendants [Li and Fu] breached their fiduciary duties and injured PrediWave. [¶] Defendants failed to conduct a reasonable inquiry as to the truth or falsity of the statements in the [Bank Letters]. Furthermore, the [Bank Letters] were not written in good faith, but rather were designed to further the interests of New World

to the detriment of PrediWave and its shareholders, thereby placing Defendants in a conflict of interest incompatible with their duties as fiduciaries. [¶] Defendant Li has admitted under oath that the freezing of PrediWave's funds could have jeopardized the normal operations of PrediWave. Yet neither Fu nor Li took any steps to convince any of the Banks to lift any restrictions, including the freezing of funds, imposed as a result of the [Bank Letters]. [¶] Accordingly, Defendants have breached their fiduciary duties to PrediWave and its shareholders, causing significant monetary damages.”

Our determination that Li made a prima facie showing that Simpson Thacher knew facts, no later than April 2005, that made the cause of action for breach of fiduciary duty arising from the Bank Letters no longer legally tenable is based on accepting as true the evidence favorable to Li, as required by our standard of review. (*Soukup, supra*, 39 Cal.4th at p. 269, fn.3.) The evidence favorable to Li includes the excerpts from his June 8, 2004 deposition that were submitted in support of his opposition to the anti-SLAPPs motion, as well as Simpson Thacher's April 4, 2005 internal memorandum concerning its investigation of Qu and Modern Office Technology. In addition, we consider the scope of Li's fiduciary duty as a PrediWave director and the application of the affirmative defense of the business judgment rule.

As this court has previously stated, “It is without dispute that in California, corporate directors owe a fiduciary duty to the corporation and its shareholders and now as set out by statute, must serve ‘in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders.’ (Corp. Code, § 309, subd. (a).)<sup>[10]</sup> This duty--generally to act with honesty, loyalty, and good faith--derived from

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<sup>10</sup> Corporations Code section 309, subdivision (a) provides, “A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”

the common law. [Citations.]” (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1037 (*Berg & Berg*), fn. omitted; *Jones v. H.F. Ahmanson & Co.*, *supra*, 1 Cal.3d at pp. 108-109.)

We find that Li’s deposition testimony is sufficient for a prima facie showing that his act of sending the Bank Letters was consistent with his fiduciary duty under Corporations Code section 309, subdivision (a). In his deposition testimony, Li acknowledged that he sent the Bank Letters after his appointment to the PrediWave board, as alleged in the Los Angeles action. Li reviewed PrediWave’s minutes and corporate documents before writing the Bank Letters. His review caused him to initiate an investigation. Li stated, “After my appointment, I was looking through all of the resolutions and one thing that struck me was there were bonuses paid to Tony Qu over the last four years totaling \$95 million. [¶] And based on my personal business judgment, that was out of range. So at that time, I thought to protect the shareholders of the company, I thought I have to do something immediately to investigate.”

Li further explained that after he reviewed PrediWave’s corporate documents, “[he] had concerns. And first of all, Tony Qu was paid \$95 million in bonuses over four years. That’s \$24 million a year. That’s a lot of money. If you talk about a top CEO in America, they get an average of [\$]14 million per year . . . . So that didn’t make any sense . . . . That’s number 1. [¶] Number 2, I saw some payments to pay for . . . real estate properties, paying for cars, I believe I saw a boat that [Qu] bought in China.” Li also intended that the Bank Letters would prevent further payment of bonuses to Qu.

When asked whether he believed that he had the right to impose restrictions on PrediWave’s bank accounts by sending the Bank Letters, Li responded as follows: “As a director of a company, my duty is to protect the interests of the company and the shareholders. When I saw something wrong, I decided to write letters to the banks telling them that I’m doing an audit, I plan to do an audit, and for the time being you should let me know for anything over [\$]50,000 that . . . you have to give me notice, and for

anything over \$500,000 I have the right to cosign. I'm simply sending a letter to them to tell them that." Li believed that the stock purchase agreement provided that "the New World representative has the right to cosign anything over \$500,000." Li further testified that at the time he and Fu sent the Bank Letters, he also believed from his review of PrediWave's board resolutions that the only other PrediWave directors were Fu and Qu.

Assuming the truth of Li's deposition testimony, as we must because our standard of review requires that "[we] accept as true the evidence favorable to the plaintiff," (*Soukup, supra*, 39 Cal.4th at p. 269, fn.3.), we find that the testimony is sufficient for a prima facie showing that Li did not breach his fiduciary duty as an outside director of PrediWave when he sent the Bank Letters. Viewed in the light most favorable to Li, his testimony reflects that he complied with his fiduciary duty by acting "with honesty, loyalty, and good faith" (*Berg & Berg, supra*, 178 Cal.App.4th at p. 1037) and in a manner that he believed "to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (Corp. Code, § 309, subd. (a).)

Li's deposition testimony is also sufficient for a prima facie showing that his act of sending the Bank Letters was protected under the business judgment rule. "The common law business judgment rule has two components--one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest.' [Citations.] . . . [I]n California the component of the common law rule relating to directors' personal liability is defined by statute. (See Corp. Code, § 309 . . . )" (*Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 257.)

The exception to the business judgment rule provides that the rule does not apply "in 'circumstances which inherently raise an inference of conflict of interest' and the rule

‘does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest.’ [Citations.]” (*Berg & Berg, supra*, 178 Cal.App.4th at p. 1045.) However, “[i]n most cases, ‘the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. [Citation.] Interference with the discretion of the directors is not warranted in doubtful cases.’ [Citation.]” (*Id.* at p. 1046.)

We recognize that Simpson Thacher has argued a different view of Li’s conduct, asserting that the business judgment rule does not apply because Li acted in bad faith by sending the Bank Letters without making a reasonable inquiry and because he had a conflict of interest as New World’s agent. However, while Simpson Thacher’s showing in its anti-SLAPP motion may have raised questions of fact regarding Li’s conduct in sending the Bank Letters (for example, whether Li made a reasonable inquiry or whether there was an actual conflict of interest with respect to the investigation of concerns about Qu), we find that Simpson Thacher has not presented evidence that as a matter of law overcomes the presumption that the business judgment rule protects Li from personal liability arising from the Bank Letters.

Additionally, as Li has pointed out, his evidence includes Simpson Thacher’s internal memorandum, dated April 4, 2005, which revealed that Simpson Thacher had developed concerns about Tony Qu’s conduct as CEO of PrediWave. The memorandum was based on Simpson Thacher’s December 1, 2004 interview with Qu and its review of PrediWave records.

In the memorandum, which was captioned “ATTORNEY WORK PRODUCT,” Simpson Thacher summarized the “Prediwave/Modern Office [Technology] relationship” and identified “potential areas of concern, including apparent inconsistencies between Tony Qu’s rendition of events and the documentary record.” Simpson Thacher noted that when Qu was interviewed by PrediWave’s attorneys from

the law firm of Wilson Sonsini with regard to Modern Office Technology's transactions, Qu stated that there was no relationship between PrediWave and Modern Office Technology and failed to disclose that Modern Office Technology was "run" by his brother and his mother was apparently its president. The memorandum states, "Tony [Qu] may have been less than forthcoming in discussions with Wilson Sonsini," and concluded that "[w]e should press Tony on his claim that Modern Office [Technology] never made any money on the memory module purchases."

Thus, by April 4, 2005, the date of Li's deposition, Li's evidence shows that Simpson Thacher knew facts that made its claim that Li had breached his fiduciary duty as a PrediWave director by sending the Bank Letters not legally tenable. (*Soukup, supra*, 39 Cal.4th at p. 292.) These facts included Li's deposition testimony that (1) he had acted to protect the interests of PrediWave and its shareholders when he initiated an investigation of Qu and PrediWave's financial matters due to the extraordinarily high bonuses of \$95 million paid to Qu; (2) he believed that he was one of three directors of PrediWave based on his review of PrediWave's corporate documents; and (3) he believed that he had the authority to cosign large transactions from PrediWave's bank accounts, also based on his review of PrediWave's corporate documents. Additionally, Li's evidence included Simpson Thacher's April 4, 2005 internal memorandum, which indicated that Simpson Thacher knew that Qu had not been truthful with respect to PrediWave's transactions with Modern Office Technology, and therefore Simpson Thacher could infer that it was reasonable for Li to suspect Qu of wrongdoing as PrediWave's CEO.

For these reasons, we determine that Li made a prima facie showing that by April 4, 2005, Simpson Thacher knew facts that made the cause of action for breach of fiduciary duty arising from the Bank Letters legally untenable and therefore Simpson Thacher continued to prosecute that claim after that date without probable cause.

(*Zamos, supra*, 32 Cal.4th at p. 970.) In light of this determination, we need not address the parties' other contentions regarding the presence or absence of probable cause.

### **3. Malice**

Finally, we determine whether Li's showing was sufficient to support the element of malice.

In a malicious prosecution action, the plaintiff must also prove that "the action was initiated with malice. [Citation.] [¶] The 'malice' element of the malicious prosecution tort relates to the subjective intent or purpose with which the defendant acted in initiating the prior action, and in past cases establish that the defendant's motivation is a question of fact to be determined by the jury. [Citations.]" (*Sheldon Appel, supra*, 47 Cal.3d at p. 874.) However, "malice can be inferred when a party *continues* to prosecute an action after becoming aware that the action lacks probable cause." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 226.)

Since we have determined that Li made a prima facie showing that Simpson Thacher continued to prosecute the cause of action for breach of fiduciary duty arising from the Bank Letters after becoming aware in April 2005 that the claim lacked probable cause, we further determine Simpson Thacher's malice may be inferred from its continued prosecution. For that reason, we find that Li's showing is also sufficient to support the element of malice. Simpson Thacher has presented no argument on this issue, either in the proceedings below or on appeal.

### **E. Conclusion**

As we have discussed, it is well established that "'[o]nly a cause of action that satisfies *both* prongs of the anti-SLAPP statute [section 425.16]—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.' [Citation.]" (*Soukup, supra*, 39 Cal.4th at pp. 278-279.) Where, as here, the defendant has established that the plaintiff's malicious prosecution action arises from protected activity--a lawsuit--the burden shifts to the

plaintiff to make a prima facie showing that the malicious prosecution action has a probability of prevailing because the defendant lacked probable cause to initiate or continue prosecuting one or more causes of action in the underlying lawsuit. (§ 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88; *Zamos, supra*, 32 Cal.4th at p. 970.)

We have determined from our independent review that Li met his burden by making a prima facie showing sufficient to support each element of his cause of action for malicious prosecution. Since Li has demonstrated a probability of prevailing, we conclude that the trial court did not err in denying Simpson Thacher's special motion to strike the complaint under section 425.16.

Having reached this conclusion, we need not address Li's request that the matter be remanded with instructions to consider Li's motion for limited discovery under section 425.16, subdivision (g).

Finally, we emphasize that our conclusion that Li met his burden in opposing Simpson Thacher's anti-SLAPP motion is not an expression of an opinion on the merits of Li's malicious prosecution action.

#### **IV. DISPOSITION**

The November 5, 2009 order denying Simpson Thacher's special motion to strike the complaint under Code of Civil Procedure section 425.16 is affirmed. Costs on appeal are awarded to respondent Jimmy Li.

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BAMATTRE-MANOUKIAN, ACTING P. J.

I CONCUR:

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MCADAMS, J.

I CONCUR IN THE JUDGMENT ONLY.

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MIHARA, J.